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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 134

ARROW DISTILLERIES, INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

ARROW DISTILLERIES, INC., A MICHIGAN CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OCTOBER TERM, A. D. 1940.

No. .....

ARROW DISTILLERIES, INC., (AN ILLINOIS CORPORATION),

Petitioner,

vs.

ARROW DISTILLERIES, INC., (A MICHIGAN CORPORATION),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Arrow Distilleries, Inc., an Illinois Corporation, prays that a Writ of Certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit, rendered on February 11, 1941, (rehearing denied March 14, 1941), reversing the decree of the United States District Court for the Southern District of Illinois, Northern Division. (R. 592.)

Statement of the Case.

On January 16, 1936, Respondent, Arrow Distilleries, Inc., a Michigan corporation, filed its Complaint in the District Court of the United States for the Southern District of Illinois, Northern Division, against Petitioner, Arrow Distilleries, Inc., an Illinois corporation, charging unfair competition because of Petitioner's use of the corporate name "Arrow Distilleries, Inc." and trade name "Arrow" and praying for damages. Petitioner in its Answer filed October 10, 1936, denied the allegations of the Bill and asserted a counterclaim claiming the exclusive right to use its corporate name "Arrow Distilleries, Inc." and trade name "Arrow" because of its priority of adoption and use and asked for an accounting of profits from Respondent.

The case was referred to William H. Moore, as Special Master, Paragraph 1 of the Order of Reference reads in part as follows (R. 51):

> "* * * to hear the parties and to take testimony herein and the interrogatories and the answers thereto and to report his findings of fact and the conclusions of law thereon to the Court. Nothing herein contained, however, shall be construed as meaning that the Special Master's findings of fact or conclusions of law shall be final but only that he shall find the facts and make his conclusions of law for the purpose of aiding the Court, and any party to this suit shall have the right to a review and a determination by the Court upon the evidence reported by the Special Master."

The Master in his Report (R. 518) found the equities with Respondent and recommended Petitioner be enjoined in the use of the aforesaid names. The Master, in preparing his report, failed to make any finding on many of the material facts.

The Petitioner thereupon filed its objections to the Special Master's Report and the matter came to a hearing

before the District Court on Petitioner's objections to the Special Master's Report.

On January 16, 1940, the District Court filed its findings of fact and conclusions of law therein (R. 531), together with its interlocutory decree dismissing Respondent's Complaint and enjoining Respondent from a continuation of the use of the aforesaid corporate name and trade name, and expressly reserving the right to, at a future time, determine, pass upon and adjudicate an account between said parties, and holding the equities to be with Petitioner.

On April 11, 1940, the District Court overruled Respondent's Motion for a new trial and to vacate the decree. (R. 550.)

On May 9, 1940, Respondent filed in said District Court, its Notice of Appeal to the Circuit Court of Appeals under Rule 73, Section (b), of the Federal Rules of Civil Procedure, from the Decree entered in this cause by said District Court on January 16, 1940.

On February 11, 1941, the Circuit Court of Appeals for the Seventh Circuit filed its opinion reversing the District Court (R. 592) and holding that the District Court was without authority in law to reject the findings of the Master unless clearly erroneous. Petition for rehearing was denied March 14, 1941. (R. 613.)

Questions Involved.

1. Did the Circuit Court of Appeals erroneously apply the Rule established in *Davis* v. *Schwartz,* 155 U. S. 631, to the instant case, where by the Order of Reference the conclusiveness ordinarily applied to the Master's findings was distinctly reserved to the District Court?

2. Does a Master's findings, which do not depend upon the weighing of conflicting testimony or credibility of wit-

nesses, have the same weight ordinarily attaching to the conclusions of a Master based upon conflicting evidence?

3. Does the mere incorporation without user of the corporate name vest property rights in the incorporator as against a prior organization unincorporated and using the same name?

4. Does the first adoptor and user of a corporate name and trade name acquire the prior and exclusive right to their use on goods of same descriptive properties?

5. Was it error for the District Court to make findings on material issues where the Master failed to make a fact finding on these material issues and the facts appeared in the evidence as reported by the Master?

6. Where the findings of the District Court and of the Circuit Court of Appeals are diametrically conflicting should this Court examine the evidence at length for the purpose of determining the facts?

Reasons for Granting the Writ.

(A) The decision of the Circuit Court of Appeals in adopting in the instant case the doctrine of *Davis* v. *Schwartz*, 155 U. S. 631, as to the unassailability of Master's findings in view of the specific nature of the order of reference, ignores and is in conflict with the principles of law established by decisions of this Court; of the Circuit Courts of Appeal in analogous cases in other Circuits and the former decisions of the Circuit Court of Appeals for the Seventh Circuit. *Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *Morimura, Arai & Co.* v. *Taback*, 279 U. S. 24; *Hovarth* v. *McCord Radiator & Mfg. Co.*, 6th Cir., 100 Fed. (2d) 326; *In Re Michel*, 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall*, 4th Cir., 81 Fed. (2d) 918; *Small, et al.* v. *Kiel*, 8th Cir., 101 Fed. (2d) 444; *In Re Duvall*, 7th Cir.,

103 Fed. (2d) 653; *Syracuse Eng. Co.* v. *Haight,* 2nd Cir., 110 Fed. (2d) 468.

(B) The decision of the Circuit Court of Appeals in adopting in the instant case the doctrine of *Davis* v. *Schwartz, supra,* where the Master's findings does not depend upon the weighing of conflicting testimony or credibility of witnesses and does not, therefore, have the weight ordinarily attaching to the conclusions of the Master upon conflicting testimony, is in conflict with the principles of law established in analogous cases by this Honorable Court and by the Circuit Courts of Appeal in other Circuits. *Tilghman* v. *Proctor,* 125 U. S. 136; *Morimura, Arai & Co.* v. *Taback,* 279 U. S. 24; *In Re Michel,* 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall,* 4th Cir., 81 Fed. (2d) 918, 919; *United Drug Co.* v. *Obear-Nestor Glass Co.,* 8th Cir., 111 Fed. (2d) 997, 999; *Syracuse* v. *Haight,* 2nd Cir., 110 Fed. (2d) 468, 470.

(C) The decision of the Circuit Court of Appeals in the instant case has the effect of ignoring and is in conflict with the principles of law established by decisions of this Honorable Court and of the Circuit Courts of Appeal in analogous cases in other Circuits which establish the doctrine that "the foundation of a trade mark or trade name is priority of adoption and actual use in trade and that mere incorporation without user of corporate name on goods of the same descriptive properties does not vest property rights in incorporator as against a prior organization unincorporated and using the same or a similar name. *Columbia Mills Co.* v. *Alcorn,* 150 U. S. 461; *In Re Trademark cases,* 100 U. S. 82; *Walter Baker & Co.* v. *Delapenha,* 3rd Cir., 160 Fed. 746; *American Washboard Co.* v. *Saginaw Mfg. Co.,* 6th Cir., 103 Fed. 81; *George* v. *Smith,* 52 Fed. 830; *National Circle, Daughters of Isabella* v. *National Order, Daughters of Isabella,* 2nd Cir., 270 Fed. 723.

(D) The decisions of the Circuit Court of Appeals in rejecting the District Court's findings on material issues

where the Master failed to make such findings, ignores and is in conflict with the decisions of this Honorable Court and of the Circuit Courts of Appeal in analogous cases in other Circuits. *Morimura, Arai Co.* v. *Taback,* 279 U. S. 24; *Hovarth* v. *McCord Radiator & Mfg. Co.,* 100 Fed. (2d) 326; *Witters* v. *Soles,* 43 Fed. 405; *In Re Michel,* 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall,* 4th Cir., 81 Fed. (2d) 98.

(E) Where there is no concurrent finding on material issues and where the findings of the District Court and of the Circuit Court of Appeals are diametrically conflicting, this Court should examine the evidence at length for the purpose of determining the facts. *Morimura, Arai & Company* v. *Taback,* 279 U. S. 24.

WHEREFORE, it is respectfully prayed that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 117 Fed. (2d) 636 and appears in the record at pages 592 to 595. Findings of Fact, Conclusions of Law and Decree of the United States District Court appear in the Record at pages 531 to 537.

II.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 11, 1941 (R. 591), and petition for rehearing duly and seasonably filed by Appellee (R. 597 to 604) was denied on March 14, 1941 (R. 613). Jurisdiction is conferred upon this Court to review this case by Writ of Certiorari under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Tit. 28, Sec. 347).

III.

Statement of Case.

The principal facts have been summarized in the Petition, *supra*, pages 2 and 3. Such elaboration of the facts as are pertinent to the discussion will be indicated where appropriate.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Seventh Circuit erred as follows:

(1) In reversing the decree of the United States District Court for the Southern District of Illinois, Northern Division.

(2) In adopting and applying the doctrine of *Davis* v. *Schwartz,* 155 U. S. 631, and holding that the District Court could not reject the Special Master's findings of fact unless they are clearly erroneous.

(3) In rejecting the District Court's finding of facts on material issues where the Special Master failed to make such findings that Petitioner had established its right to the use of trade name "Arrow" as a technical trade-mark.

(4) In applying the doctrine of *Davis* v. *Schwartz, supra,* in the instant case where the consent given and the order of reference was conditioned by the terms of the order itself which limited the functions of the Master to "find the facts and make his conclusions of law for the purpose of aiding the Court".

(5) In failing to apply the doctrine that the right to the exclusive use of a trade-mark is limited to an actual use of the trade-mark as distinguished from mere adoption thereof.

(6) In holding Petitioner guilty of unfair competition.

V.

Argument.

(A) The Circuit Court of Appeals Erroneously Applied the Rule Established in Davis v. Schwartz, 155 U. S. 631, to the Instant Case. By the Order of Reference the Conclusiveness Ordinarily Applied to the Master's Findings Was Distinctly Reserved to the District Court (R. 50, 51).

The Order of Reference in the instant case referring the proceedings to the Special Master reads as follows:

> "That the above entitled cause is hereby referred to William H. Moore, an attorney of Peoria, Illinois, as Special Master to hear the parties and to take testimony herein and the interrogatories and the answers thereto and to report his findings of fact and the conclusions of law thereon to the Court. *Nothing herein contained, however, shall be construed as meaning that the Special Master's findings of fact or conclusions of law shall be final but only that he shall find the facts and make his conclusions of law for the purpose of aiding the Court, and any party to this suit shall have the right to a review and a determination by the Court upon the evidence reported by the Special Master.*" (Emphasis supplied.)

By reason of this Order of Reference when Petitioner filed its objections to the Master's report (R. 523 to 530), it became the duty of the District Court to determine the issues upon the evidence reported by the Master.

The District Court having performed the duty charged to it in the Order of Reference, it is the findings of the District Court which are presumptively correct and should not be disturbed unless clearly erroneous. Federal Rule of Civil Procedure 52 (a), 28 U. S. C. A. following Section 723(c).

In *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, the District Court, by consent of parties, appointed a Special Master, "with all of the powers conferred upon the master under the rules of practice for the courts of equity of the United States, and subject to the further orders of this Court, * * * for the purpose of taking all testimony in the suit and reporting to the Court said testimony, his findings of fact and such conclusions of law as he may deem essential to the proper advisement of the Court".

This Court, speaking through Mr. Justice Pitney, held (page 182):

> "In the present case, the consent given to the order of reference *was conditioned by the terms of the order itself*, which as we have seen, limited the functions of the master to the taking of testimony and reporting it to the Court, together with his findings of fact and conclusions of law *for the advisement of the Court.*" (Emphasis supplied.)

This Court in *Denver* v. *Denver Union Water Co., supra*, distinguishes the case of *Davis* v. *Schwartz*, 155 U. S. 631, saying on pages 181, 182:

> "In the former case (*Kimberly* v. *Arms*, 129 U. S. 512) the reference, made by consent of the parties, authorized the master to hear the evidence and decide all the issues between them, and it was because of this that the court held that the findings were not merely advisory, as in the ordinary case, but were to be taken as presumptively correct, 'subject, indeed, to be reviewed under the reservation contained in the consent and order of the Court, when there has been manifest error in the consideration given to the evidence, or, in the application of the law, but not otherwise'; and that the findings ought to have been treated as so far correct and binding as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made. *Davis* v. *Schwartz* IS TO THE SAME EFFECT."

It is respectfully submitted that a comparison of the Order of Reference in the instant case with the Order of

Reference in the case of *Denver* v. *Denver Union Water Co., supra,* must draw the positive conclusion that the instant case presents a strong and clear case for the application of the rule established by this Honorable Court in the Denver case, and it necessarily follows that the rule established in *Davis* v. *Schwartz, supra,* is clearly distinguishable and has no application whatsoever to the instant case in view of the language of the Order of Reference.

By the rule established in *Denver* v. *Denver Union Water Co., supra,* THE ORDER OF REFERENCE DETERMINED THE RIGHTS OF THE PARTIES AND BECAME THE LAW OF THE CASE AND IS BINDING UPON THE PARTIES AND THE COURTS IN ALL SUBSEQUENT PROCEEDINGS.

The peculiar language of the Order of Reference in the instant case gave to either of the litigants the right to petition the District Court for the District Court's own determination upon the evidence reported by the Master. The Petitioner by filing its objections to the Master's Report took advantage of its right given to it by the Order of Reference. The Master having failed to perform the duty charged to him in the Order of Reference when he made his advisory findings, it became the duty of the District Court to find the facts and law and these findings are presumptively correct, and the Circuit Court of Appeals should not have disturbed them in the absence of "Manifest Error".

We respectfully submit that the Circuit Court of Appeals should have applied in the instant case the doctrine as established by this Honorable Court in *Denver* v. *Denver Union Water Co., supra,* instead of applying the rule of *Davis* v. *Schwartz, supra.* To the same effect see:

2nd Circuit:

In Re Michel, 56 Fed. (2d) 15.

Syracuse Engineering Co. v. *Haight,* 110 F. (2d) 468.

4th Circuit:
Wilson v. *Hall,* 81 Fed. (2d) 918.

6th Circuit:
Hovarth v. *McCord Rad. & Mfg. Co.,* 100 Fed. (2d) 326.

8th Circuit:
Small, et al. v. *Kiel,* 101 Fed. (2d) 444.

7th Circuit:
In Re Duvall, 103 Fed. (2d) 653.

Also see:
Morimura, Arai & Co. v. *Taback,* 279 U. S. 24.

(B) Where the Master's Findings Does Not Depend Upon the Weighing of Conflicting Testimony or Credibility of Witnesses It Does Not Have the Weight Ordinarily Attaching to the Conclusions of the Master Upon Conflicting Evidence.

Finding number 7 of the District Court (R. 532-533) reads in part as follows:

> "Robert Silberstein and Harry A. Frankel, who afterwards became President and Secretary, and principal stockholders of Arrow Distilleries, Inc., an Illinois corporation, on June 27, 1933, entered into a partnership agreement for the purpose of rectifying, bottling, dealing in and selling whiskey and alcoholic beverages, under the firm name and style of 'Arrow Distilleries Company'; * * * that, thereafter, on or about the 23rd day of November, 1933, the said co-partnership assigned to 'Arrow Distilleries, Inc.' the assets, firm name and good will of said co-partnership."

Finding number 8 of the District Court (R. 533) reads in part as follows:

> "That said partnership formed by Silberstein and Frankel maintained an office in the Lehmann Building

> in Peoria, Illinois, with its name 'Arrow Distilleries Company' on the door * * *".
>
> Ben Weinstein, Sales Manager of Petitioner Company, testified (R. 100) when called by Respondent as an adverse witness "that he first started his activities in preparation for that (Petitioner's) corporation in June 1933."

The original partnership agreement was introduced into evidence. (Def. Ex. 667, R. 497.)

Notwithstanding the fact that the testimony of Weinstein was undisputed and that the parts of the District Court's findings numbers 7 and 8 above quoted was supported by clear, substantial and UNDISPUTED evidence the Master found contrary and held that there was no property rights in the name prior to September 15, 1933.

Therefore, the specific finding by the Master that there was no property rights in the name "Arrow Distilleries, Inc." prior to September 15, 1933, manifestly did not depend upon the weighing of conflciting testimony or the credibility of witnesses but upon his own opinion. For this reason, if for no other, it does not have the weight ordinarily attaching to the conclusions of a Master upon conflicting evidence and it was clearly due to error or mistake. *Tilghman* v. *Proctor,* 125 U. S. 136, 149, 31 L. Ed. 664, 668; *Morimura, Aria & Co.* v. *Taback,* 279 U. S. 24, 33, 73 L. Ed. 586, 600.

It necessarily follows that Rule 53 (e) (2) of Federal Rule of Civil Procedure, which provides, that in an action to be tried without a jury the Court shall accept the Master's findings of fact unless they are clearly erroneous, does not apply to the instant case where undisputed facts were presented and the District Court in following the doctrine laid down in *Tilghman* v. *Proctor, supra,* did not err in rejecting the Master's finding of fact and the Circuit Court of Appeals erred in failing to apply this rule.

The District Court having performed the duty reserved

to it in the Order of Reference, it is the findings of the District Court which are presumptively correct and the Circuit Court of Appeals should not have disturbed them in the absence of "Manifest Error". Federal Rule of Civil Procedure, 52 (a), 28 U. S. C. A. following Section 723 (c); *In Re Duvall,* 7th Cir., 103 Fed. (2d) 653; *Webb* v. *Frisch,* 7th Cir., 111 Fed. (2d) 887, 888; *Syracuse Engineering Co.* v. *Haight,* 2nd Cir., 110 Fed. (2d) 468, 470; *United Drug Co.* v. *Obear-Nestor Glass Co.,* 8th Cir., 111 Fed. (2d) 997, 999; *In Re Michel,* 2nd Cir. 56 Fed. (2d) 15; *Wilson* v. *Hall,* 4th Cir., 81 Fed. (2d) 918, 919.

(C) Incorporation of a Company Under a Corporate Name Confers No Right to Said Name or the Dominant Portion Thereof Without User Thereof and Does Not Vest Property Rights in Incorporator as Against a Prior Organization Whether Incorporated or Not and Using the Same Name. The Foundation of a Trade-Mark or Trade Name is Priority of Adoption and Actual Use in Trade.

In the case of *National Circle, Daughters of Isabella* v. *National Order, Daughters of Isabella,* 270 Fed. 723 (C. C. A. 2) the facts are that the defendant was incorporated on June 24, 1903, under the name "Daughters of Isabella" in the State of New York. The plaintiff corporation was incorporated on March 7, 1904, under the laws of the State of Connecticut and under the name "Daughters of Isabella". The evidence showed that the plaintiff corporation was organized by members of a voluntary association which was first organized in May, 1897, and which first used the name "Daughters of Isabella" in 1901. Upon its incorporation on March 7, 1904, it adopted the same constitution, used the same ceremonies, and continued to carry out the plans and purposes of the original voluntary

association and to be known by the name of "Daughters of Isabella". The Court said (page 731):

> "Importance cannot be attached to the fact that the defendant was incorporated first. The mere incorporation of an organization under a particular name does not add anything to its right to use the name as against another organization unincorporated and already using the same or a similar name."

To the same effect see: *American Foundries* v. *Robertson*, 269 U. S. 372, 380; *Holland Furnace Co.* v. *New Holland Machinery Co.*, 24 Fed. (2d) 751; *France Milling Co.* v. *Washburn Crosby*, 7 Fed. (2d) 304.

So in the instant case, while the Respondent was incorporated September 15, 1933, and the Petitioner was incorporated November 18, 1933, the Petitioner succeeded to the rights by assignment (R. 198) of it from the copartnership made up of Robert Silberstein and Harry A. Frankel, which did business under the firm name and style of "Arrow Distilleries Company" which had been organized June 27, 1933, for the purpose of conducting the same class of business as Petitioner. It is respectfully submitted that under such assignment the rights of the Petitioner attached at the time of the formation of the partnership on June 27, 1933. *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Peck Bros. Co.* v. *Peck*, 7th Cir. 113 Fed. 291.

Repeal of National Prohibition became effective December 5, 1933 (21st Amendment to the Constitution*). That was the first day upon which either the Petitioner or Respondent could legally sell alcoholic liquor in intra or inter state business notwithstanding the fact that both litigants had been making preparations for the start of business for some time prior to the Repeal date.

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* The 21st Amendment which became effective on December 5, 1933, reads in its pertinent provisions as follows:

> "SECTION 1. The 18th Article of Amendment to the Constitution of the United States is hereby repealed."

If the Court does not consider as important or material the activities of either litigant prior to December 5, 1933, and if the Court gives neither of the litigants advantages of their acts prior to December 5, 1933, your Petitioner is still entitled to prevail because it established its technical trade-mark use long prior to the use of Respondent.

The evidence is undisputed and admitted by Respondent that the first shipment of alcoholic beverages made by Respondent Company was on February 21, 1934. (R. 59, 64, 110, 119.)

Petitioner on December 5, 1933, and continously thereafter, long before Respondent made its first shipment of alcoholic beverages, purchased and received large quantities of whiskey, gin, alcohol and cordials. (Def. Ex. 165 to 237 inc., R. 169, 170, 171, 173 to 179 inc.) Petitioner on December 5, 1933, and thereafter, labeled bottles of alcoholic liquors with its corporate name "Arrow Distilleries, Inc." and brand name "Arrow" (Def. Ex. 239, 499, 500, 501, 502, 669, 670, 671; R. 85, 164, 200, 207, 244, 277, 278, 330, 331, 332, 409, 410, 423, 424, 462, 472) and shipped them out to actual customers from whom it had taken orders before that day. (Def. Ex. 21 to 29 inc., 31, 34, 34A, 36 to 40 inc., 302 to 313 inc., 240 to 301 inc., 314 to 440 inc., R. 183, 184.) The evidence clearly shows that from December 5, 1933, until the time of the filing of this suit the Petitioner continually made sales of all types of alcoholic beverages under the trade-mark "Arrow" and the corporate name "Arrow Distilleries, Inc." and that Petitioners business grew from a total of $25,303.68 in 1933 to the sum of $2,167,727.73 for the year 1935, the year immediately preceding the filing of this suit. (R. 317, 318.)

(D) Petitioner Having First Adopted and Used Corporate Name "Arrow Distilleries, Inc." and Trade-Mark "Arrow" on Alcoholic Liquors, It Acquired the Prior and Exclusive Right to Their Use on Goods of the Same Descriptive Properties.

As shown above Petitioner was the first to make shipments of alcoholic liquors under both the trade-mark "Arrow" and the corporate name "Arrow Distilleries, Inc." Rights in a trade-mark or trade name are based upon priority of adoption and use. The one who first employs a trade-mark or trade name in connection with a particular class of goods acquires the prior and exclusive right to use it in connection with that class of goods.

In the case of *Columbia Mills Co.* v. *Alcorn*, 150 U. S. 460, 37 L. Ed. 1144-1146, this Court said:

> "The exclusive right to the use of a mark or device claimed as a trade-mark, is found on priority of appropriation; that is to say, the claimant of a trade-mark must have been the *first to use or employ the same on like articles of production.*" (Emphasis supplied.)

In *"The Trade Mark Cases,"* 100 U. S. 82, 25 L. Ed. 550-552, this Court said:

> "At common law the exclusive right to it grows out of the use of it, and not its mere adoption. By the Acts of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the Statute for any other qualification or condition."

In the case of *Walter Baker & Co.* v. *Delapenha*, 160 Fed. 746, 749 (C. C. A. 3) the Court said:

> "Nor does the fact that the Complainant adopted and used its trade-marks but a short time before the defendants imported and sold goods bearing like

trade-marks, alter the situation. *The complainant's rights accrued as soon as it had put goods upon the market bearing its trade-marks. Priority of use rather than priority of invention confers the rights.* The right to use does not depend upon any particular period of user; once a trade-mark is adopted in good faith and used, the right thereto inures and will prevail against any subsequent user." (Emphasis supplied.)

See also, *United Drug Co.* v. *Rectanus,* 248 U. S. 90; *American Washboard Co.* v. *Saginaw Manufacturing Co.,* 6th Cir., 103 Fed. 281, 287; *George* v. *Smith,* 52 Fed. 830; *Delaware & Hudson Canal Co.* v. *Clark,* 13 Wall. 311, 20 L. Ed. 581; *McLean* v. *Fleming,* 96 U. S. 245, 24 L. Ed. 828; *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 60 L. Ed. 713; *Continental Corp.* v. *National Union Radio Corp.,* 67 Fed. (2d) 938 (C. C. A. 7).

It is respectfully submitted that in view of the undisputed evidence in this case that the opinion of the Circuit Court of Appeals is in conflict with and ignores the authorities cited and that the Circuit Court of Appeals erred in not holding that Petitioner had established a prior technical trade-mark use of the name "Arrow". It is further submitted that the bare incorporation by Respondent could not defeat the technical trade-mark so established by Petitioner.

(E) Where the Master Fails to Make a Fact Finding on a Material Issue But the Facts Appear in the Evidence as Reported by Him, It Was the Duty of the District Court Under the Order of Reference to Make the Findings Without a Re-reference, and Enter Its Conclusions of Law Thereon and Enter Such Decree as Was Equitable in the Premises.

Finding number 9 of the District Court's Finding of Facts (R. 533) reads in part as follows:

"* * * That on December 5, 1933, defendant (Petitioner here) obtained from the Treasury Department

the necessary Tax Stamps to enable it to legally conduct its business of selling alcoholic liquors; that on December 5, 1933, it bought and sold and delivered alcoholic liquors, and that such liquors going out of said plant had labels on the bottles containing the same, reading in two places, front and back 'Arrow Distilleries, Inc.' That all its bottles containing alcoholic liquors sold from that day until the date of the filing of this suit, had 'Arrow Distilleries, Inc., Peoria, Illinois,' upon them; that some bore the brand name 'Arrow', some bore a traget with an arrow piercing it, and others bore a ribbon seal with a large letter 'A' and the word 'Arrow' beneath it; that on December 6, 1933, and continuously thereafter, defendant made like shipments of alcoholic beverages in interstate commerce."

The evidence in support of Finding No. 9 of the District Court was all in the record as reported by the Master to the District Court. The Master made no finding whatsoever on any of the material issues contained in Finding No. 9 of the District Court. Under such circumstances it became the duty, by reason of the Order of Reference, of the District Court to make findings of fact on such issues upon which the Master neglected to find.

The case of *Hovarth* v. *McCord Radiator & Mfg. Co.*, 6th Cir., 100 Fed. (2d) 326 (Certiorari denied, 60 Sup. Ct. 101), was a patent infringement case which was referred to a Master to take the evidence and report his conclusions of law and fact. The Court on page 333 said:

> "The report of the Master made no specific findings of fact with reference to the precise issues raised by the parties."

The Court then enumerated four separate issues on which the Master failed to report saying (pages 332 and 333):

> "The findings of a Master or the District Court are presumptively correct and cannot be assailed unless an examination of the record shows that the Master or the lower Court made no specific findings of fact in reference to the precise issues.

> • • • The Masters report is merely *an expression of an opinion* as to what he believed should be the award to Hovarth and falls clearly within the rule of condemnation of a Master's finding laid down by the Supreme Court in the case of *Morimura, Arai & Co.* v. *Taback,* 279 U. S. 24, 34; 49 S. Ct. 212; 73 L. Ed. 586, and should be disregarded.
>
> The error of procedure, however, does not necessitate sending the case back to the District Court. It has been pending more than ten years and should be decided. The issues were fully heard before the Master and all evidence tendered by the parties was admitted. The exceptions taken to his findings raise no serious question of fact and we have before us in the record the evidence and all other materials necessary for judgment. The district court made no findings of fact but adopted the report of the Master. Therefore, we proceed to do what the district court should have done, namely, consider the report, pass upon the exceptions and make such decree as is equitable in the premises • • •."

In *Morimura, Arai & Co.* v. *Taback,* 279 U. S. 24, 34, this Court said:

> "In the Master's report—which is set forth in the margin—he made no specific finding of fact in reference to the precise issues, but without citing any testimony or giving his reason, stated generally that he believed the statement was 'substantially correct'. The District Judge—after referring to the vagueness and generality of this report—stated that obviously the statement was false and was made for the purpose of obtaining credit. The Circuit Court of Appeals—after referring to the fact that the Master saw and heard all the witnesses—without determining whether or not the statement was correct, stated that they were not satisfied that a 'consciously false financial statement was made for the purpose of obtaining credit.'
>
> As there is no concurrent finding on any of the material issues relative to the written statement, we have examined the evidence at length for the purpose of determining the essential facts."

To the same effect see:

Denver v. *Denver Union Water Co.*, 246 U. S. 178.
Clark v. *Schieble Toy & Novelty Co.*, 6th Cir., 248 F. 276, 282.
Witters v. *Sowles*, 43 Fed. 405.
Wilson v. *Hall*, 4th Cir., 81 Fed. (2d) 918.
In Re Michel, 2nd Cir., 56 Fed. (2d) 15.
Carpenter, Balson & Fendler v. *Condor Pictures*, 9th Cir., 110 Fed. (2d) 317.

So in the instant case, the Master having failed to make findings of fact in reference to the technical trade-mark rights of Petitioner, it became the duty of the District Court to make such findings and to then proceed to "make such decree as was equitable in the premises".

The District Court having performed the duty of the Master it is the findings of the District Court which are presumptively correct and the Court of Appeals erred in reversing the District Court. Federal Rule of Civil Procedure 52 (a) 28 U. S. C. A. following Section 723-C.

(F) Where There Is No Concurrent Finding on Material Issues and Where the Findings of the District Court and of the Circuit Court of Appeals Are Diametrically Conflicting, This Court Should Examine the Evidence at Length for the Purpose of Determining the Facts.

A comparison of the Opinion of the Circuit Court of Appeals with the Findings and decree of the District Court will show that they are hopelessly irreconcilable.

In *Morimura, Aria & Co.* v. *Taback, supra*, this Court said:

> "As there is no concurrent finding on any of the material issues relating to the written statement, we have examined the evidence at length for the purpose of determining the essential facts."

It is respectfully submitted that the instant case presents a proper case for the application of the doctrine of this Court as stated in the Morimura case and this Honorable Court should examine the evidence at length "for the purpose of determining the essential facts".

Conclusion.

It is believed that the foregoing discussion demonstrates that the decision of the Court below is contrary to the pertinent principles of law established by the decisions of this Court and the Circuit Courts of Appeal in other Circuits. It is earnestly urged, for the foregoing reason, that this Court entertain a review of this case on Writ of Certiorari, and we submit, therefore, that the Petition should be granted.

Respectfully submitted,

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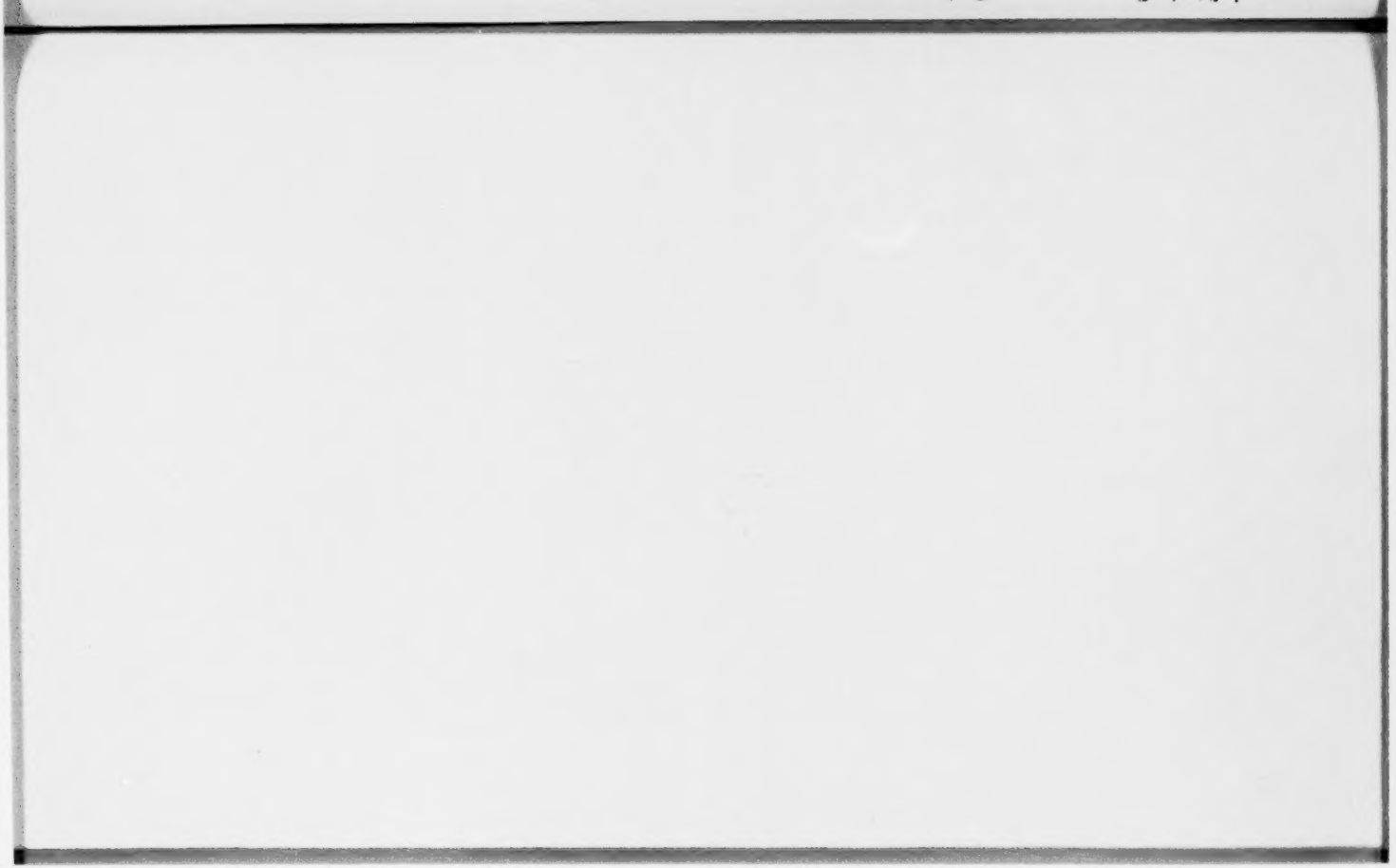

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 134

ARROW DISTILLERIES, INC, an Illinois Corporation,
Petitioner,

vs.

ARROW DISTILLERIES, INC., a Michigan Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF REASONS WHY PETITION SHOULD BE DENIED.

We submit as reasons why the petition should be denied:

1. The questions raised by the petition turn on an interpretation of facts, all of which were adjudicated adversely to petitioner by the Master who heard all the witnesses and by the Court of Appeals, which determined from an independent review of the evidence that the findings of the Master "were not only supported by

substantial evidence, but a reading of the evidence convinces us that they were supported by a preponderance thereof."

2. There is no conflict or shadow of conflict between the rulings of this Court, the rulings of the respective Circuit Courts, and the judgment below on the questions involved in said petition.

3. The petition is utterly inconsistent, stating on the one hand that the Master's findings does "not depend upon the weighing of conflicting testimony or credibility of witnesses", on the other hand, that the findings of the District Court (overruling the Master) and the findings of the Court of Appeals (which sustained the Master) are "diametrically conflicting." The Master, the District Court and the Court of Appeals all found conflicting evidence, and that credibility of witnesses was involved.

HISTORY OF THE WRONGFUL APPROPRIATION BY PETITIONER OF RESPONDENT'S CORPORATE NAME, TRADE NAME AND OTHER ACTS OF UNFAIR COMPETITION.

In the summer of 1933 it became apparent that the Twenty-first Amendment to the United States Constitution to repeal the Eighteenth Amendment would become affective by the end of that year (December 5, 1933), and that it would be legally possible, upon compliance with the necessary regulations, to engage in the business of manufacturing and selling alcoholic beverages. Plaintiff-respondent, in anticipation of this event, was incorporated in the State of Michigan on September 15, 1933, under the corporate name of "Arrow Distilleries, Inc." The new corporation took over the well established busi-

ness of the old International Extract & Research Laboratories, with which plaintiff's President had been connected, and actively prepared for its business of making and selling alcoholic cordials after repeal, while continuing to sell under its new corporate name of Arrow Distilleries, Inc., the non-alcoholic products of its predecessor.

Prior to the organization of defendant, plaintiff under its corporate name "Arrow Distilleries, Inc.," actually sold and shipped in interstate commerce 101 separate shipments of non-alcoholic cordials and flavoring extracts in cartons bearing its name as shipper (R. 130). These were billed by plaintiff, Arrow Distilleries, Inc., in its corporate name (R. 104). The record shows that as early as August, 1933, plaintiff had ordered supplies for its alcoholic products, such as glass bottles and the like, and had purchased a sizable building in Detroit (R. 66, 107).

Other contracts for bottles, labels, corks, advertising materials, booklets, leaflets, catalogs and order blanks were ordered by plaintiff in October and November, 1933 (R. 61, 67). These have plaintiff's name "Arrow Distilleries, Inc." and plaintiff's trade name "Arrow".

Advertising material prominently displaying plaintiff's trade name "Arrow" and plaintiff's corporate name "Arrow Distilleries, Inc." was placed in the hands of a large number of plaintiff's representatives throughout most of the country, and facsimiles of plaintiff's bottles, also displaying the trade name "Arrow" and plaintiff's corporate name, were used in order that plaintiff's representatives might familiarize the trade with the appearance of plaintiff's product, and from which orders for goods could be received (R. 67, 104, 133).

By the middle of November, 1933, plaintiff's plant was equipped to manufacture and bottle alcoholic liqueurs, and proceeded to receive orders to be delivered after plaintiff had received the necessary federal and state permits (R. 68, 107).

Many such orders for plaintiff's Arrow cordials and deposits in connection therewith were received by plaintiff as early as October and November, 1933 (R. 68), including orders for several hundred cases of alcoholic cordials and liqueurs from Illinois, New York, Maryland, Delaware, Wisconsin and other states (R. 70-1).

Much advertising, bearing the corporate name and trade name Arrow for the new products was done.

One of such advertisements was placed in October, 1933, for publication in the November issue of Midas Criterion, a national publication (R. 67, Pl. Ex. 66). The record shows that over a thousand prospective accounts, being largely old customers of plaintiff or its predecessor, were communicated with in November, 1933, and many of the orders received as a result of this campaign are listed at page 70 *et seq.* of the record.

On November 18, 1933, over two months after plaintiff was incorporated, defendant was incorporated as an Illinois corporation, under the identical name used by plaintiff, to-wit, Arrow Distilleries, Inc. (R. 82), and leased premises on Washington Street, Peoria, in November, 1933 (R. 163). Defendant claimed before the Master and the Court of Appeals that it succeeded to an alleged partnership business between Frankel and Silverstein, President and Secretary, respectively, of the defendant corporation. However, no business was done under the partnership until November, 1933. Silverstein, defendant's president, testified:

"After Frankel and I organized our partnership we had many meetings. We obtained lists of former Ben Weinstein Malt Company jobbers. We arranged meetings about financing. We interviewed Ben Weinstein and talked over various labels, and organization work, *and then in November* started taking orders and deposits, hiring salesmen, *and getting into active business*" (R. 237).

Plaintiff immediately protested in November, 1933, by long distance telephone to the adoption of this name by defendant. Shortly thereafter plaintiff received a letter (Pl. Ex. 47) on the letterhead of Arrow Distilleries, *Co.*, as follows:

"Warehouse — Office
401 South Washington Street — 506 Lehmann Bldg.
Arrow Distilleries Co.
Peoria, Illinois
Telephone 7592

November 25th, 1933

Mr. Abe Weinstein
3539 Concord Avenue
Detroit, Michigan

Dear Abe:

I was very much surprised when you called me on the phone this morning to learn that you had also incorporated the 'Arrow Distilleries' in the State of Michigan.

The reason we happened to pick this name was that Louis Schwabacher, a grandson of the original founder of the Arrow Brand is connected with our Organization and also Dave Friedman who was the last one to have possession of the Arrow firm.

We have already had some of our labels printed and have taken orders under the name of 'Arrow Distilleries, Inc.'

I am terribly sorry that this mix-up has happened and that we have both chosen the same name and want you to know that anything I can do to influence my associates to change this name and cooperate in every manner, I will be glad to do. However, when

I made this suggestion to them this morning, they seemed bitterly opposed to changing the name on account of the right they feel they have to it.

I would like to see the copy of the labels you are using so that we will not conflict on labels. It is our intention to start out with just blended whiskies and gins and not put out a line of cordials.

I will appreciate hearing from you by return mail and your advising me as to what your thoughts are on the matter.

Assuring you that I want to cooperate in every way, believe me to be,

Sincerely yours,

ROBERT SILVERSTEIN" (R. 57).

Upon receipt of the letter plaintiff's President went to Peoria to protest in person. The testimony is in conflict as to this conference. Plaintiff's President testified that defendant agreed that it would make a change in its name as soon as it possibly could do. Defendant also stated, as is stated in the letter of November 25, 1933, that they would not compete with plaintiff but would restrict their business to whiskey and gin and "had no intention of entering into the liqueur field" (R. 58). However, defendant did start in the liqueur and cordial business in competition with plaintiff in the fall of 1934, about one year after it started doing business. Plaintiff sent another protest to defendant by registered mail on November 23, 1935, again protesting against the use of plaintiff's names. This letter was returned to plaintiff marked "Refused. Unclaimed" (R. 58).

It appears from the record that Hiram Walker Distilleries and Distilleries and Brewers Corporation had sold a small amount of whiskey to defendant which defendant sold in December, 1933, without rebottling or re-labelling the products, but upon a part of which it claims to have

added a sticker "Distributed by Arrow Distilleries, Inc." (R. 87).

As late as May, 1934, defendant corporation was not manufacturing a drop of liqueur or cordials. They were making only gin and they were bottling only whiskey (R. 114).

A former employe of defendant, Walter Grundy, testified that in May, 1934, defendant was not manufacturing any cordials and was bottling straight whiskies and manufacturing and bottling blended whiskies and gin. He also testified that prior to the summer of 1935 defendant bottled no whiskies or gin under the name "Arrow" (R. 138).

The record shows that plaintiff upon receiving its federal and state permits continuously shipped in large quantities in interstate commerce, pursuant to orders previously received, cordials and liqueurs, beginning on February 20, 1934 (R. 59, 106).

The United States Government requires the keeping of Government Form Book 52, which shows all receipts of and shipments of all alcoholic products, one copy being retained and two copies going to the Division Office of the Bureau of Internal Revenue. Plaintiff produced its copies, and there can be no controversy as to the extent and widespread distribution of plaintiff in practically every state, which permits the sale of alcoholic beverages. See (Pl. Exs. 56-A and B, R. 118). Defendant did not produce its copies although requested to do so.

Defendant put out a circular, Plaintiff's Exhibit 104, featuring the brand name "Trianon" and containing the statement:

> "We are indeed proud to have Mr. Ignazio Caruso at the head of our cordial plant, which incidentally was outfitted under his personal supervision."

The record shows that Caruso started to work for the defendant in October, 1934, at which time he furnished defendant with his picture and the affidavits which are reproduced in Plaintiff's Exhibit 104 (R. 99). The circular (Pl. Ex. 104) further states:

> "Arrow Distilleries, Inc. of Peoria has led its field, first in whiskies, then in cordials and after repeal in whiskies once more.
>
> "Arrow didn't go back into the cordial business until we could find a capable head for our cordial department."

The reference to earlier whiskies and cordials was admittedly merely an advertising puff, inasmuch as defendant had no connection with any earlier company (R. 300). Incidentally, this folder contains pictures of several dozen products of defendant but none with "Arrow" labels. It does contain a reference to the effect that "Arrow" straight whiskies may be had under private brands.

On cross-examination defendant's President Silverstein testified:

> "We started labeling whiskey under the brand name of Arrow in December, 1935" (R. 251).

After defendant learned of plaintiff's corporate names, defendant purchased some whiskey and gin and a small line of cordials which it resold in the original bottles. It claims to have appended to the bottles or to some of them an additional sticker having the words "Distributed by Arrow Distilleries, Inc., Peoria, Ill." The testimony is conflicting as to the amount of such sales, and the practice of relabelling. Many witnesses, including defendant's employes and salesmen, testified that the goods they saw being handled or the goods they received from defendant had no such additional labels.

Nat Goodwin, defendant's former distributor in St. Louis, from December, 1933, to March, 1934, testified that he sold D & B merchandise for defendant until defendant brought out its own whiskey and gin about March 1, 1934. He examined much of the merchandise on the shelves which he sold. None of this merchandise received from defendant prior to March 1, 1934, had anything on the bottles to indicate that the defendant had anything to do with the bottling of the goods or the contents. He testified, "The first merchandise I ever saw or received from the defendant with the name Arrow Distilleries on it was just after March 1, 1934" (R. 158).

On cross-examination by defendant's counsel, Mr. Goodwin said:

> "The bottle of D & B goods did not have a little paster on it; they did not have a little paster reading 'from the Arrow Distilleries of Peoria.' I didn't see every bottle, but those I observed had no label of that kind on it at all. I sold nothing for the defendant but D & B liquor" (R. 159).

Sam Frienberg, operator of a drug store having a liquor department at St. Louis, was working as clerk and buyer at the Cleveland Drug Company in St. Louis in December, 1933. Shortly after repeal he bought defendant's liquor from Nat Goodwin, their St. Louis salesman. The bottles contained Hiram Walker labels and Distillers & Brewers labels. He testified:

> "There was no sticker on the bottle with the name 'Arrow Distilleries' on it. None of the bottles I received in that shipment had any stickers or labels on them bearing the name Arrow Distilleries" (R. 515).

Addie Rowell, one of the two employees of defendant in the latter part of November, 1933, testified that no

stickers were put on the bottles in the early days of defendant's business. She said:

> "If the defendant had received any quantity of labels between November, 1933, and January 1, 1934, I would have known about it. If a shipment of small stickers to be used on bottles had come in there during that time in any amount I would have known it. The supply room was an old safe. The supplies were kept on shelves in that safe. The defendant first started to put labels on bottles when they first started to manufacture liquor. That was quite late in February, 1934. I never saw anyone putting any small strips on bottles which read 'bottled by Arrow Distilleries, Peoria, Illinois' or 'Distributed by Arrow Distillers, Peoria, Illinois' or any similar wording prior to the time they started bottling. If anything of that kind had been done to any extent I would have seen it because my duties took me throughout the plant" (R. 506-7).

Frankel, defendant's secretary, testified to the contrary but admitted that defendant merely added another sticker to the labels already on the whiskey purchased from others (R. 87), and that labels were not put on all of the bottles (R. 97, 98).

On cross-examination the witness Rowell further testified:

> "Up until they started bottling their own whiskey in February, 1934, all shipments went out in the original packages without being opened or making any change that I ever saw and I was in and out of the shipping room very frequently every day" (R. 509).

Defendant's president admitted that some bottles were early put out by defendant which had no stickers or labels of defendant whatever (R. 247).

The record contains many instances of confusion as found by the Master and the Court of Appeals. Mrs.

Catherine Wilder, of Milwaukee, Wisconsin, familiar with plaintiff's products as sold under its name "Arrow" bought defendant's products under the name "Arrow", thinking they were the products of plaintiff, because she was familiar with plaintiff's name, Arrow Distilleries, Inc., and plaintiff's trade name "Arrow" (R. 148).

Albert Halperin, in the restaurant and liquor business in Chicago, bought defendant's product thinking that they were the products of plaintiff (R. 141).

Emil Nathan, associated with his father's partnership known as Emil Nathan Distillers Representative, at University City, Missouri, related many instances of confusion where customers thought they were buying plaintiff's products but got defendant's products and were disappointed with them (R. 143, 144, 145).

Joseph Kremarik operates a tavern in Milwaukee and was a customer of plaintiff. He purchased some of defendant's product depending upon the trade name "Arrow" and thinking it was plaintiff's product. However, when the goods were delivered he discovered the mistake and refused to accept it (R. 149).

Mayer Brown in the liquor business in Chicago, a customer of plaintiff, bought defendant's product relying upon the name and trade name, and was deceived and confused as to the products, and had complaints concerning defendant's products which he had bought because of confusion (R. 149, 150).

Many other instances of confusion on the part of customers are shown in the record. In addition trade reports were constantly confusing the two companies, to the detriment of plaintiff. Checks were sent to the defendant which belonged to plaintiff, the United States Treasury Department was confused between plaintiff and defend-

ant with reference to a package which was admitted in evidence (R. 73). Plaintiff was charged by the Alcoholic Beverage Commission of the State of Indiana in the early part of 1935 with certain violations of Indiana laws and regulations. The record shows that the Indiana officials confused plaintiff with defendant and later officially admitted the error (R. 74).

THE PROCEEDINGS BEFORE THE MASTER.

The entire testimony was taken before the Master who heard 48 witnesses, whose testimony aggregates 2,475 pages. In recommending a decree for the plaintiff, the Master made specific findings, including the following:

> (a) Prior to September 15, 1933, there was no existing corporation by the name of Arrow Distilleries, Inc., and no property rights in said name;
>
> (b) Plaintiff, Arrow Distilleries, Inc., was incorporated September 15, 1933, in Michigan, and that defendant was incorporated under the same name on November 18, 1933, in Illinois;
>
> (c) Plaintiff immediately upon its incorporation began to operate in both state and interstate business, and during October, 1933, it actively prepared for doing business in cordials and liqueurs which could be made and sold legally after December 5, 1933, including the purchase of building, advertising, ordering bottles, labels, corks, cartons, catalogs, order blanks and materials in the name of Arrow Distilleries, Inc., or some part thereof, and has continuously since that time used its corporate name, or some part thereof, to mark all the goods bought or sold by it in both state and interstate business;
>
> (d) "That the plaintiff began to do business under its corporate name immediately upon its incorporation, inserting advertisements for and hiring salesmen, had salesmen out soliciting for business, and did many other acts showing an immediate and

continuous doing of business under its corporate name and before the defendant was incorporated or did any business."

(e) "That about November 25, 1933, the plaintiff discovered that the defendant had been incorporated in Illinois under the name of Arrow Distilleries, Inc., and fearing the effect on the public of the two corporations doing business of the same nature under the same name, the plaintiff called the defendant on the phone and endeavored to have the defendant change its name for the purpose of avoiding misunderstanding and confusion in the public mind; that after a trip to Peoria by representatives of the plaintiff, and several conversations with representatives of the defendant company, the defendant refused to negotiate further and returned the plaintiff's letters unopened, and continued wrongfully to use the corporate name 'Arrow Distilleries, Inc.' in its interstate business to the damage and detriment of the plaintiff."

(f) "That many instances of confusion were caused by the corporate names of the plaintiff and defendant being the same and by the similarity of labels and printing, and that the continued use of the name 'Arrow Distilleries, Inc.' and the word 'Arrow' as a brand name by the defendant was calculated to confuse and deceive and did confuse and deceive customers and prospective purchasers of the plaintiff's products to the loss and damage of the plaintiff."

(g) "That the defendant, Arrow Distilleries, Inc., of Peoria, Illinois, has been guilty of unfair competition with the plaintiff, as charged in the plaintiff's complaint, in that it has pursued a consistent course that has resulted in much confusion in the minds of the public and has injured the business of the plaintiff, and that such unfair competition consists:

a. In selling liqueurs and cordials under the brand name of the Plaintiff, 'Arrow', and with labels prominently displaying the name of the manufacturer in connection therewith, the corporate name 'Arrow Distilleries, Inc.';

b. In putting on the market alcohol, whiskey and gin under labels prominently displaying as the name of the manufacturer, 'Arrow Distilleries, Inc.' and in so placing those products on the market, in such a way as to make it possible for dealers to pass off on the buying public the defendant's products as products manufactured by the plaintiff, to the detriment of the plaintiff's reputation.

c. In causing confusion as to the identity of the plaintiff by the adoption and the continued use of the same corporate name as the plaintiff after being notified and requested to cease using plaintiff's name.

d. By a course of conduct making it possible for distributors, jobbers, and dealers to pass off defendant's products as those of the plaintiff and by so doing appropriate sale and profits which rightfully belonged to the plaintiff; and

e. By so imitating the label of plaintiff's Tom and Jerry that the public has been deceived into purchasing defendant's product believing that it was obtaining the product of the plaintiff."

The opinion of the Court of Appeals specifically refers to the taking of all of the testimony before the Master and the fact that the trial court heard no testimony, and after reviewing the facts and the findings of the Master, said:

"We think they were not clearly erroneous in this case. They were not only supported by substantial evidence, but a reading of the evidence convinces us that they were supported by a preponderance thereof" (R. 595).

In view of the conflicting evidence this Court may take judicial notice of defendant's record of misbranding of bottles and falsifying of records as fraud, condemned and adjudicated against defendant in *Arrow Distilleries, Inc. (def.)* v. *Alexander*, 109 F. (2d) 397, C. C. A. 7, in which defendant's license was suspended. Certiorari was denied. 210 U. S. 646.

ARGUMENT.

All of the points now sought to be re-argued in the Supreme Court were presented to and decided adversely to petitioner by the Circuit Court of Appeals, either in its opinion rendered February 11, 1941 (117 F. (2d) 636) (R. 592-5) or in its denial of the petition for rehearing decided March 14, 1941 (R. 613).

The main case relied upon by petitioner is *Denver* v. *Denver Union Water Co.*, 246 U. S. 178. In that case the Supreme Court did what the Court of Appeals did in the instant case, to-wit, reviewed the testimony and completely sustained the findings of the Master. There is nothing in the Denver case, either in the decision of the Court or dictum which conflicts with the instant decision of the Court of Appeals. If counsel had analyzed that case they would have hardly placed their main reliance in their repeated citation and argument concerning it.

In the Denver case the Denver Water Company brought suit against the City of Denver to restrain the enforcement of an ordinance fixing the rates for water, upon the ground that such rates did not afford a fair and reasonable compensation based upon the value of the property of plaintiff, and hence amounted to the taking of private property without due process of law. The Master to whom the case was referred to take testimony and report the same to the court, in his findings found a proper valuation of the property, and that the effects were confiscatory. On review the District Court held that it was without power to consider the question of law raised or to examine the facts and affirmed the Master's report.

The Supreme Court while affirming the Master's report

held that on matters of law the trial court should have examined such questions. The Supreme Court proceeded to do so, and specifically approved the findings of the Master. A quick understanding of the case may be derived from the last four lines of the opinion of the Supreme Court to the effect that the decree of the District Court, which had sustained the Master's findings "will be modified so as to overrule, instead of striking out, the exceptions taken by defendants to the Master's report, and as so modified it will be affirmed."

Petitioner seems to argue that no weight attached to the Master's findings because of a reservation in the reference to the Master that the findings or conclusions of law of the Master should not be final, and that the findings of the Court of Appeals are entitled to no weight. Such a contention is unsound for three reasons:

(1) All of the testimony was taken and all of the witnesses appeared before the Master. The evidence was highly conflicting as found by the Master, the Trial Court and the Court of Appeals, and the Master was the only judicial body who had an opportunity to observe the witnesses and completely judge credibility. The logic behind Rule 53(e)(2) of the Rules of Civil Procedure providing that "in an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous" is applicable. This is so especially in view of Rule 52 which, while referring to the Court, emphasizes the proposition that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opinion of the trial court to judge of the credibility of the witnesses."

(2) The reservation in the order of reference was plainly intended and could only have the effect of averting the operation of that portion of old Equity Rule 61½

which provided that a consent reference might bind the parties to accept the findings of the Master as final to the same extent as an arbitrator's award. It could not affect, nor does it intend or appear to have been intended in any way to modify the normal operation of the old Equity Rule or the provisions of Federal Rules for Civil Procedure 53(e)(2). The reservation had no effect in view of the further provision of Federal Rules for Civil Procedure 53(e)(2) which provides that the Court after hearing may adopt, modify or reject the report. In view of the fact that all of the testimony was taken before the Master, and all of the witnesses appeared before him, and no witness appeared before the trial court, the Master was in a better position than anybody else to judge credibility and weigh conflicting evidence.

In *Adamson* v. *Gilliland*, 242 U. S. 350, this Court said (p. 353):

> "* * * The case is preeminently one for the application of the practical rule that so far as the findings of the master or judge, who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

(3) The Court of Appeals specifically found that the findings of the Master were not "clearly erroneous", but held that "they are not only supported by substantial evidence but a reading of the evidence convinces us that they were supported by a preponderance thereof" (R. 595).

Petitioner in its specification of errors (p. 8) complains that the Master "failed to make such findings that petitioner had established its right to the use of the trade

name 'Arrow' as a technical trade mark." Apparently counsel are confused as to the issues in this case. No technical trade mark was asserted in the pleadings or introduced in evidence or claimed by either of the parties. In fact petitioner specifically admitted that it had never applied for trade mark registration (R. 271, 408).

The argument that the Master did not make complete findings was presented to the Court of Appeals which found adversely to petitioner. One example should suffice.

Petitioner asserted its trumped-up charge that a so-called partnership had made an earlier use of the corporate name. The Master held specifically that there was no proprietary interest in the name prior to the time plaintiff-respondent was organized. The Master heard the conflicting testimony of petitioner's own witnesses, and with the admission of respondent's president, Silverstein, that the partnership did not start taking orders and deposits and getting into active business until November, 1933 (R. 237), was fully justified in holding that plaintiff was the first appropriator of the corporate name as well as of the trade name.

Petitioner says there is no conflicting evidence. The above example and many others referred to in the opinion of the Court of Appeals shows that the testimony of petitioner's own witnesses was so highly conflicting that little credence could be given it.

Perhaps nowhere is better illustrated the proposition that the trier of the facts, who saw and heard the witnesses, was better able to make findings than in the con-

tention made on pages 18 and 19 of the petition that the findings of the trial court who saw no witnesses should prevail. Petitioner relies upon a finding of the trial court that since December 5, 1933, respondent labeled all of its bottles with its name, and some of them with the name "Arrow". Had the trial court been able to see the witnesses, it would have been compelled to consider the admissions of defendant's officers to the effect that defendant was not manufacturing liqueurs and cordials in June, 1934 (R. 291). In fact, defendant's president was compelled to admit that not all of the bottles, purchased from others, were re-labeled, and that much of it went out in the original cartons and were not identified by defendant, and that even as to cartons which defendant did open, some of the bottles were not re-labeled or marked in any manner by defendant (R. 195-6). Defendant's secretary, Frankel, admitted that labels were not put on all of the bottles of defendant, and that some bottles that came in from distillers and brewers were not changed as to labels or otherwise at all (R. 97). In addition the record shows from the testimony of former employes and agents of defendant that it did not re-label its early shipments or attach stickers "distributed by Arrow Distilleries, Inc.", or attach any other means of identification (R. 158-9, 515, 506-7). On these conflicting contentions and conflicting evidence the Master and the Court of Appeals found and awarded priority of use to plaintiff.

The record in this case clearly demonstrates that there is no conflict between the decisions of this Court and the Seventh Circuit, or any other circuit; that no important question of federal law is involved which has not heretofore been settled and decided by this Court; that there is no special or important reason for a review of

this case by this Court, or any other reason for this Court to entertain jurisdiction of this cause.

We therefore respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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